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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION

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SUCCESSFACTORS, INC., a Delaware corporation,

Plaintiff,

v.
SOFTSCAPE, INC., a Delaware corporation; and DOES 1-10, inclusive,

Defendant.

Case No. CV 08-01376 CW (BZ)

JOINT CASE MANAGEMENT STATEMENT

Date: June 17, 2008

Time: 2:00 p.m.

Dept: 2

Judge: The Honorable Claudia Wilken

Plaintiff SuccessFactors, Inc. ("Plaintiff" or "SuccessFactors") and Defendant Softscape, Inc. ("Defendant" or "Softscape") jointly submit this Case Management Statement and [Proposed] Order and request the Court to adopt those portions on which the parties agreed as its Case Management Order in this case. To the extent that the parties have not reached agreement, those portions are identified below.

I. JURISDICTION AND SERVICE

This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 15 U.S.C. § 1125(a) (Lanham Act), 15 U.S.C. §§ 32 and 43 (Trademark Infringement), 18 U.S.C. § 1030 (Computer Fraud and Abuse Act), and 28 U.S.C. § 1367 (pendent

1 jurisdiction). The parties are not aware of any issues with respect to personal jurisdiction or venue.
 2 Softscape has been served and answered the Complaint.

3 **II. FACTS**

4 **A. Plaintiff's Statement of Facts**

5 Softscape authored a 43-page “hit piece” that was broadly distributed over the internet on
 6 March 4, 2008. It was sent to approximately 766 separate e-mail addresses using the anonymous e-
 7 mail address, hcmknowledge2008a@gmail.com. This e-mail address was created on March 4,
 8 2008 at approximately 9:44 p.m. EST. The Google records show the Gmail account was accessed
 9 at approximately 10:03 pm EST from the Courtyard Marriott Hotel in Waltham, Massachusetts,
 10 which is less than nine miles away from Softscape’s headquarters in Wayland, Massachusetts. The
 11 Gmail was addressed to a list that included at the end, following a long alphabetical list of potential
 12 customers, a roster of the precise attendees at a recent SuccessFactors’ prospect dinner—a roster
 13 that Softscape obtained surreptitiously through a person that joined Softscape two months later as
 14 an employee.

15 The “hit piece” consists of a PowerPoint presentation entitled “The Naked Truth” (the
 16 “Presentation”). It is written on a SuccessFactors PowerPoint template and purports to have been
 17 written by and include statements and complaints from SuccessFactors’ customers. The
 18 Presentation attacks SuccessFactors’ corporate integrity including numerous false and misleading
 19 statements concerning customer satisfaction with SuccessFactors’ products, allegations of dozens
 20 of “failed implementations” thereof, false statistics about SuccessFactors’ retention of its
 21 customers, and false depictions of the functionality of SuccessFactors’ products.

22 The John Anonymous e-mail was sent to SuccessFactors’ customers, prospective customers
 23 and competitors in an attempt to unfairly compete with SuccessFactors. Softscape has yet to
 24 produce any evidence that the Presentation – which they admit authoring for its own internal use –
 25 was sent by anyone other than an officer, director or agent of Softscape.

26 Although SuccessFactors believes that Softscape has thus far failed to produce most of its
 27 documents, additional evidence collected by SuccessFactors in a 30(b)(6) deposition further
 28 implicates Softscape. As noted above, the John Anonymous e-mails included addresses of

1 SuccessFactors' prospects and customers attending a PeopleConnect event hosted by
2 SuccessFactors in New York City on February 28, 2008 ("the SuccessFactors' Customer List").
3 The names and e-mail addresses from this List are replicated in the identical (and non-alphabetical)
4 order in which they appear on SuccessFactors' internal list for the PeopleConnect event, with only
5 three exceptions (two names were omitted and one particular customer is addressed first on the e-
6 mail addressee list). Softscape's witness testified that the SuccessFactors' Customer List was
7 improperly acquired and disclosed to Softscape by a current Softscape employee, Larry Kurzner,
8 without knowledge, authorization or consent of SuccessFactors. (Softscape has thus far failed to
9 produce any documents about Kurzner's communications of this information.)

10 The scheme to distribute the Presentation began with Softscape's Chief Executive Officer,
11 Dave Watkins, who was the primary author of the Presentation. Mr. Watkins devised a ploy to
12 access SuccessFactors' password protected sales demonstration software and to obtain a
13 confidential sales proposal in order to acquire information to include in the Presentation and
14 compete with SuccessFactors. He deceptively used his [REDACTED] company
15 in Puerto Rico, New Millenium Shoe Company ("New Millenium Shoe"), [REDACTED] where
16 he is also the CEO, to pose as a prospective customer of SuccessFactors. He used his sister-in-
17 law, Ely Valls, to contact SuccessFactors on behalf of New Millenium Shoe to gain access and
18 participate in SuccessFactors' demonstration version of its software.

19 SuccessFactors' sales representative, Jorge Corrales, set up and participated in two web
20 meetings on February 19, and 21, 2008, for the New Millenium Shoe company. Unbeknownst to
21 Mr. Corrales or anyone else at SuccessFactors, the first web meeting and online demonstration
22 was actually presented to Mr. Watkins' wife, Lillian, posing as her sister, the shoe company
23 owner, Ely Valls. Mr. Watkins silently attended. He and his wife then asked for a second
24 demonstration, this time in English, which occurred two days' later on February 21, 2008.
25 Softscape's CEO pretended to be a New Millenium Shoe consultant named, Javier Cruz, during
26 the second demonstration. After the first demonstration, "Ms. Valls" asked for and received a
27 confidential sales proposal. Two of the pages from the confidential sales proposal were included
28 in the Presentation.

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1 Watkins admitted as 30(b)(6) witness that e-mails purportedly written by "Ely Valls" were
2 actually penned by him. He also admitted that himself, as well as at least one other Softscape
3 employee, used a password obtained by falsely posing as New Millenium Shoe to access
4 SuccessFactors' website, and that, after staying up to 2:00 a.m mining the SuccessFactors' site
5 following the Corrales' demonstration, he wrote materials that subsequently were included in the
6 Presentation. [REDACTED]

7 [REDACTED]
8 [REDACTED]

9 The Presentation was designed to dissuade its readers from doing business with
10 SuccessFactors. It is altogether false and misleading because it represents that it was created by
11 SuccessFactors' customers. Moreover, it attacks SuccessFactors' corporate integrity based on
12 numerous false and misleading statements about customer retention and purportedly "failed
13 implementations." These false and misleading statements include false descriptions of
14 SuccessFactors' relationships with its customers. It deceptively claims that certain customers
15 have left because they were displeased with SuccessFactors' services, products, or
16 implementations thereof and misrepresents SuccessFactors' customer retention rate.

17 The statements in the Presentation also attack SuccessFactors' product architecture,
18 delivery model, and product capabilities. For example, the Presentation includes the following
19 bogus claims: there is a security risk to customers' data because customers' data is mixed in a
20 single database; SuccessFactors' products require consulting efforts of 1650 hours per
21 installation; SuccessFactors makes changes to features every month without customers'
22 permission; SuccessFactors' products are unable to cope with situations where an employee
23 changes their position and manager during the year; users must scroll though long forms in
24 SuccessFactors' product when in fact customers can tab through; the Compensation function of
25 SuccessFactors' product "is not a process but a Form"; and that SuccessFactors' "Ultra"
26 functionality is a "scam." As a result of Softscape's dissemination of the Presentation,
27 SuccessFactors has been damaged and irreparably harmed in the form of lost sales and injury to
28 its goodwill.

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1 On March 11, 2008, SuccessFactors filed a complaint in this Court for False Advertising,
 2 Trademark Infringement, Computer Fraud and Abuse, Defamation, Trade Libel, Intentional
 3 Interference with Prospective Economic Relations, and Unfair Competition. The Court entered a
 4 Temporary Restraining Order on March 13, 2008, and a Preliminary Injunction on March 27,
 5 2008.

6 **B. Defendant's Statement of Facts**

7 Softscape disagrees with the accuracy of SuccessFactors' recitation of the facts. Softscape
 8 believes that the Court has already been apprised of the factual issues through preliminary
 9 injunction proceedings, and therefore submits the following brief statement:

10 Softscape has been sued by SuccessFactors for the single publication of a document to a
 11 handful of SuccessFactors' current and prospective customers via an anonymous email on March
 12 4, 2008. Specifically, the document that appears to be a SuccessFactors' PowerPoint presentation
 13 that highlights shortcoming with SuccessFactors' products and services, as well as its failed
 14 customer relationships ("the Presentation").

15 Softscape created an internal PowerPoint (the "Softscape Internal PowerPoint" or "SIPP")
 16 that is similar to the Presentation, which was based on substantiated facts, including but not
 17 limited to feedback from SuccessFactors customers and publicly available information on
 18 SuccessFactors' website. It was intended for internal use only and was not designed or intended
 19 for external distribution. Softscape did not expressly or implicitly authorize the external
 20 dissemination or publication of the SIPP or any derivative thereof. Softscape also denies that it
 21 modified the SIPP as reflected by the Presentation and denies that it approved of or participated in
 22 the circulation of the Presentation.

23 Softscape further contends that SuccessFactors has engaged in the same allegedly
 24 wrongful conduct that underpins its various claims, including having SuccessFactors employees
 25 pose as customers and gain access under false pretenses to Softscape's products and attempting to
 26 access Softscape's secured computer systems without its authorization. In that regard, Softscape
 27 believes that it is likely that a disgruntled current or former SuccessFactors employee may be
 28 "John Anonymous." This possibility is supported by the fact that the Gmail account used to

1 email the presentation was created from an IP address in a foreign city where SuccessFactors has
2 an office and Softscape does not.

3 Finally, despite Softscape's repeated requests for SuccessFactors to voluntarily produce
4 evidence of its alleged damages that directly resulted from the emailing of the Presentation, such
5 as the loss of any actual or prospective customers, SuccessFactors has yet to adequately do so or
6 otherwise articulate any measurable monetary damages. While fact and expert discovery has yet
7 to be completed, Softscape does not believe that SuccessFactors' will be able to offer any
8 evidentiary support for its damages claims.

9 **III. LEGAL ISSUES**

10 While the parties reserve the right to raise additional legal issues as they may develop
11 during the course of the case, the parties believe the following legal issues are currently in
12 dispute:

13 1. Whether the statements in the Presentation identified in SuccessFactors' complaint
14 and preliminary injunction papers constitute libel or trade libel under California law.

15 2. Whether the statements in the Presentation identified in SuccessFactors' complaint
16 and preliminary injunction papers constitute false or misleading statements under the Lanham
17 Act.

18 3. Whether the statements in the Presentation identified in SuccessFactors' complaint
19 and preliminary injunction papers, and the dissemination thereof, constitute false advertising
20 under California law. Whether the Presentation identified in SuccessFactors' complaint and
21 preliminary injunction papers, and the dissemination thereof, constitutes trademark infringement
22 under the Lanham Act.

23 4. Whether SuccessFactors has any prospective economic relations that Softscape
24 had knowledge of and allegedly interfered with thereby causing direct and proximate harm to
25 SuccessFactors.

26 5. Whether SuccessFactors is entitled to a permanent injunction for false advertising
27 under the Lanham Act based on any allegedly false or misleading statements in the Presentation.

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1 6. Whether SuccessFactors is entitled to a permanent injunction for trademark
 2 infringement under the Lanham Act based Softscape's alleged use of SuccessFactors' trade name
 3 and logos.

4 7. Whether Softscape's alleged unauthorized access and use of confidential,
 5 competitively sensitive information contained in SuccessFactors' ACE online demo and in its
 6 confidential business proposal disclosed to Softscape under false pretenses establishes liability
 7 under the Computer Fraud and Abuse Act, state computer fraud laws, and state and federal unfair
 8 competition law.

9 8. Whether SuccessFactors is entitled to a permanent injunction and/or restitution for
 10 the alleged unfair competition and/or false advertising under California law.

11 9. Whether SuccessFactors is entitled to damages for an alleged violation of the
 12 Computer Fraud and Abuse Act.

13 10. Whether SuccessFactors is entitled to a permanent injunction and/or damages for
 14 trademark infringement and/or for making false and misleading statements in violation of the
 15 Lanham Act.

16 11. Whether SuccessFactors has suffered damages as a direct and proximate from any
 17 alleged libel, trade libel and/or alleged interference with prospective economic advantage.

18 12. Whether any of SuccessFactors' claims are barred by the doctrine of unclean
 19 hands.

20 13. Whether Softscape can be held liable for any of the alleged wrongdoing under the
 21 doctrine of respondeat superior.

22 14. Whether the Presentation constitutes protected speech under the First Amendment.
 23 Additional legal issues that may be raised by SuccessFactor's potential amendments to its
 24 Complaint as discussed below.

25 **IV. MOTIONS**

26 The parties are currently engaged in several discovery disputes regarding Defendant's
 27 compliance with the initial round of written discovery. Likewise, Defendant is dissatisfied with
 28 Plaintiff's compliance with its initial round of written discovery. The parties also have a

1 fundamental disagreement regarding the pace and scope of discovery. There is currently a
2 discovery conference scheduled before the Honorable Bernard Zimmerman on June 16, 2008.
3 The parties hope that this conference will assist in resolving some of their current disputes.
4 However, if the parties are unable to resolve their disputes, they anticipate the necessity of filing
5 discovery motions.

6 The parties anticipate that it will file summary judgment motions at the conclusion of fact
7 and expert discovery. The parties propose that the deadline for filing dispositive motions should
8 be February 9, 2009.

9 **V. AMENDMENT OF PLEADINGS**

10 **Plaintiff's Position:**

11 Once Defendant has completed its compliance with initial discovery, Plaintiff intends to
12 amend the complaint to include additional facts and causes of action. Plaintiff intends to include
13 allegations based on Defendant's false press releases relating to the Presentation, as well as other
14 conduct that has become known since the initial filing of the complaint including but not
15 limitation the false pretexting and mail fraud. To prepare a more complete amendment, Plaintiff
16 needs to receive the production of documents that Defendant thus far has yet to make. Since it
17 appears that motions to compel may be required, it is Plaintiff's position that the deadline for
18 amending the pleadings should be August 29, 2008.

19 **Defendant's Position:**

20 Softscape objects to the proposed August 29, 2008 deadline to amend the pleadings.
21 SuccessFactors appears to already have the requisite information, much of which it admits is
22 publicly available, to amend its Complaint and should have done so already. If SuccessFactors is
23 permitted to wait until August 29, 2008 to seek amendment, if leave to amend is granted
24 sometime thereafter, it is highly likely that the parties will not have sufficient time under the
25 proposed case management schedule to conduct discovery on the claims that SuccessFactors is
26 likely to include in an amended complaint. Notwithstanding the foregoing, by August 1, 2008,
27 Softscape will have completed its document production and will likely seek to amend its Answer
28 and affirmative defenses therein to further specify the facts supporting its unclean hands defense.

1 **VI. EVIDENCE PRESERVATION**

2 The Court entered a document preservation order on April 23, 2008. *See* Dkt. No. 88.

3 Counsel for the parties have certified to the Court that they have notified their respective clients

4 of their document preservation obligations pursuant to federal law. *See* Dkt No. 110 (Declaration

5 of Jessica Grant) and Dkt. No. 109 (Declaration of Patrick Premo). Softscape's CEO, Dave

6 Watkins, was ordered to and did provide a sworn declaration that Softscape has suspended any

7 document destruction policies or procedures and has represented that Softscape is in compliance

8 with evidence preservation order. *See* Dkt No. 98 (Declaration of Dave Watkins).

9 **VII. DICLOSURES**

10 The parties will exchange Initial Disclosures and documents identified in the disclosures

11 (to the extent not previously disclosed) by June 12, 2008.

12 **VIII. DISCOVERY**

13 Softscape contends that the number of depositions should be set at twelve (12) per side,

14 while SuccessFactors believes that it should be twenty (20) depositions per side. The parties

15 agree to set the number at twelve (12) depositions, without prejudice to requesting additional

16 numbers by stipulation or by order from the discovery magistrate. If there is a need to further

17 increase that number, the parties agreed to meet and confer when such a need arises. The parties

18 also previously agreed to extend the time for the first sitting of deposition of their respective Rule

19 30(b)(6) depositions from seven (7) hours to twelve (12) hours. Except as noted, all remaining

20 discovery shall proceed as provided under Federal Rules of Civil Procedure.

21 **IX. CLASS ACTIONS**

22 Not applicable.

23 **X. RELATED CASES**

24 On June 4, 2008, the day after SuccessFactors announced a secondary public offering,

25 Defendant Softscape filed an action in Middlesex County Superior Court in the Commonwealth

26 of Massachusetts against SuccessFactors. The Massachusetts action asserts claims of trade secret

27 misappropriation, intentional interference with contract, and unfair competition under

28 Massachusetts law for SuccessFactors' alleged misappropriation of undisclosed Softscape's trade

1 secrets by former Softscape employees currently working at SuccessFactors. SuccessFactors has
 2 not been served with the complaint, has not been provided adequate notice of the facts underlying
 3 the allegations, and has not had an opportunity to investigate the allegations.

4 While SuccessFactors contends that there appears to be overlap between the lawsuits, it is
 5 premature to determine whether or not it may be transferred to this jurisdiction. Softscape
 6 contends that the California and Massachusetts actions are not sufficiently related to warrant
 7 transfer or consolidation, nor could they be, because there is no basis for federal jurisdiction in
 8 the Massachusetts action. The parties are not aware of any other related cases or proceedings
 9 pending before another judge of this Court or before another court or administrative body.

10 **XI. RELIEF**

11 Plaintiff seeks a permanent injunction, corrective advertising, compensatory damages,
 12 treble damages, and costs of suit including reasonable attorneys' fees and interest. Softscape
 13 denies that Plaintiff is entitled to any relief at law or equity.

14 **XII. SETTLEMENT AND ADR**

15 The parties have stipulated and agreed to participate in private mediation before JAMS to be
 16 concluded by November 28, 2008. This date presupposes that discovery is substantially completed
 17 by that time.

18 **XIII. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES**

19 The parties do not consent to have a magistrate judge conduct all further proceedings.

20 **XIV. OTHER REFERENCES**

21 The case is not suitable for reference to binding arbitration, special master, or the Judicial
 22 Panel on Multidistrict Litigation.

23 **XV. NARROWING OF ISSUES**

24 The parties believe that the issues remaining for trial may be narrowed by summary
 25 judgment motions. The parties also agree to endeavor to stipulate to factual issues and the
 26 authenticity of documents, where appropriate, prior to trial.

27 **XVI. EXPEDITED SCHEDULE**

28 The parties do not anticipate that the case can be handled on an expedited basis.

1 **XVII. SCHEDULING**

2 The parties propose the following schedule based on the Federal Rules of Civil Procedure
 3 and Local Rules:

4	DESCRIPTION	5	DEADLINE
6	Initial Case Management Conference	7	June 17, 2008
8	Last day to join parties or amend pleadings	9	Plaintiff proposes a deadline of August 29, 2008; Defendant proposes a deadline of August 1, 2008
10	Fact discovery closes; last day to serve supplemental disclosures; last day to identify affirmative expert witnesses	11	November 26, 2008
12	Last day to file motions to compel discovery	13	December 9, 2008
14	Last day for the parties to exchange opening expert reports	15	December 17, 2008
16	Last day for the parties to exchange rebuttal expert disclosures and reports	17	January 9, 2009
18	Expert discovery closes	19	January 23, 2009
20	Last day to file dispositive motions	21	February 9, 2009
22	Last day to respond to requests for authentication of documents	23	March 16, 2009
24	Last day for dispositive motions to be heard	25	March 16, 2009
26	Last day to file Joint Pretrial Statement	27	April 6, 2009
28	Final Pretrial Conference	29	April 27, 2009
	Jury trial begins	30	May 11, 2009

25 **XVIII. TRIAL**

26 The case will be tried to a jury. The parties expect the trial to last 10-15 days.

XIX. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS

Plaintiff filed its "Certification of Interested Entities or Persons" pursuant to Civil Local Rule 3-16 indicating there are no interested entities. Defendant filed its "Certification of Interested Entities or Persons" pursuant to Civil Local Rule 3-16 indicating there are no interested entities.

XX. ADDITIONAL MATTERS

The parties are not aware of any additional matters relating to the disposition of this case that can be brought to the Court's attention at this time.

Dated: June 12, 2008

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